FILED
NOV 21 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-803

THOMAS WALTER LARKE,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

Michael J. McCabe
SAVITZ & McCABE
108 Ivy Street
San Diego, CA 92101
(714) 231-1181

Attorneys for Petitioner

TOPICAL INDEX

	page
AUTHORITIES CITED	ii
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	1
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	15
PROOF OF SERVICE	16
APPENDIX "A"	

AUTHORITIES CITED

CASES	PAGE
Yaich v. United States 283 F.2d 613, 616-617 (9th Cir.1960)	7
United States v. Dibble 429 F.2d 598, 602 (9th Cir.1970)	7
United States v. Weiss 491 F.2d 460, 465 (2d Cir.1974)	9
United States v. Jackson 544 F.2d 407, 409 (9th Cir.1976)	10,13
Rakas v. Illinois __U.S. __ 58 L. Ed 2d 387(1978)	11
United States v. Mulligan 488 F.2d 732, 736-737 (9th Cir.1973)	11
Michigan v. Tyler 436 U.S. 499, 505 (1978)	14

STATUTES

Title 28 U.S.C. Section 1254(1)	2
Fifth Amendment of the United States Constitution	2
8 U.S.C. Section 1324	3
Rule 902, Federal Rules of Evidence	3

IN THE

SUPREME COURT OF THE UNTIED STATES

OCTOBER TERM, 1979

NO. _____

THOMAS WALTER LARKE,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, THOMAS WALTER LARKE, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered August 30, 1979.

OPINION BELOW

The Court of Appeals entered its opinion and judgment on August 30, 1979. A copy

of the opinion is attached and marked as Appendix "A".

JURISDICTION

On August 30, 1979, the Court of Appeals entered judgment affirming the criminal conviction of Petitioner for illegal transportation of aliens. The jurisdiction of this court is invoked under Title 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals applied the proper standard of law in reviewing the admissibility of an unauthenticated document.

2. Whether the Court of Appeals erred in ruling that Petitioner had abandoned his vehicle and therefore lacked standing to contest its search.

CONSTITUTIONAL PROVISIONS
INVOLVED

Fifth Amendment of the United States Constitution.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. Section 1324; Rule 902, Federal Rules of Evidence.

STATEMENT OF THE CASE

On the early morning of February 14, 1979, Border Patrol Agent Skinner was eastbound on Otay Lakes Road when he encountered a white one-ton Ford truck traveling at a high rate of speed. Agent Skinner followed the truck for approximately three miles, during which time he reached speeds in excess of 100 miles per hour. Skinner observed the truck extinguish its lights and turn north on a section of Otay Lakes Road known as the "Bonita cutoff". Approximately 100 yards after making this turn, the driver stopped the truck on the right-hand side of the road and leaped out of the door and ran up a steep embankment towards a housing project. The truck was left with the door

open and the keys in the ignition.

After determining that he could not overtake the driver, Agent Skinner attempted to determine whether there were any people concealed within the cargo compartment of the truck by pounding on the side of the vehicle. Hearing no sound inside the cargo compartment, Skinner ran a vehicle check on the truck. He was informed that the truck was registered to Thomas Walter Larke, the Petitioner. Following receipt of this information, he requested a back-up unit from Chula Vista Police Department. When Police Officer Dyke arrived, the padlocked rear door of the truck was forced open and 28 illegal aliens were discovered inside.

During the time that Agent Skinner was conducting his search of the truck, Agent Lamp overheard, on his radio, Skinner running the registration check on the truck and the

dispatcher's report that it was registered to the Petitioner. Approximately five minutes after hearing this communication, while walking in a housing project near Otay Lakes Road, Lamp noticed a man walking ahead of him. The man in front of him was wearing pants which were wet from the knees down, as were his shoes. Lamp approached the man and asked for some identification. The individual identified himself through a display of his driver's license which showed him to be Thomas Walter Larke. Larke was then taken into custody by Agent Lamp. He was subsequently indicted and convicted.

REASONS FOR GRANTING THE WRIT

1. In holding that the registration certificate was admissible, the Court of Appeals applied an erroneous standard of law. The question of the admissibility of a

document cannot be resolved by reference to what the jury might properly have inferred. Rather, the proper test is whether the government sufficiently authenticated the document to permit its introduction into evidence.

In dealing with Petitioner's contention that a copy of the registration certificate was improperly admitted into evidence as not having been properly authenticated, the Court of Appeals held:

> There was sufficient evidence for the jury to infer that the registration certificate had been in the truck, was removed by one of the police personnel and handed to the border patrol agent. The authenticity of the registration certificate could also be inferred by the jury. The indicia of reliability and trustworthiness of chain of custody and authenticity are sufficiently strong as to preclude any miscarriage of justice in this case. (Slip Opinion at p.7).

In so holding, the Appellate Court applied an erroneous standard of law for determining the admissibilty of a document. Contrary to

the Court's assertion, the admissibility of an item of documentary evidence does not depend upon whether or not the evidence is sufficient for the jury to infer its authenticity. Rather, it is encumbent upon the government to demonstrate the authenticity of the document by competent evidence. As the Ninth Circuit held in Yaich v. United States, 283 F.2d 613, 616-617 (9th Cir. 1960), "(E)ven though a public document is competent evidence, it is not to be received into evidence unless and until it has been authenticated." See, also, United States v. Dibble, 429 F.2d 598, 602 (9th Cir. 1970)) (establishing authenticity is condition precedent to admissibility of document).

In the instant case, there was absolutely no testimony indicating the authenticity of the document. The individual who recovered the document, Officer Ken Dyke of the Chula Vista Police Department, did not testify at

the trial and therefore was not available to fulfill the government's burden of demonstrating where the document had come from. Although the document appeared to be regular on its face, there was absolutely no demonstration that Dyke had not had previous contact with the vehicle nor the Petitioner prior to the date of Petitioner's arrest on February 14, 1979. Since the document was not a certified copy of an official record, it was not admissible under the provisions of Rule 902, Federal Rules of Evidence, permitting the admission into evidence without foundation of certain self-authenticating documents including public records.

In even more compelling circumstances indicating the bona fides of a proferred document, the Second Circuit has rejected the admission into evidence of such a document absent the necessary foundation demonstrating

its authenticity. In United States v. Weiss, 491 F.2d 460, 465 (2nd Cir. 1974), a passport in possession of an individual to whom it related was proferred into evidence. The Second Circuit upheld the ruling of the District Court declining to admit the document into evidence holding that such a document was clearly inadmissible without proper testimonial authentication. In that case as in the case at bench, the proferred document was required to be in the possession of the person to whom it related and was issued by an official government entity. Nevertheless, the Court correctly ruled that it could not come into evidence even though there, as here, the jury might properly have inferred its authenticity.

Had this document been properly excluded from evidence, pursuant to Petitioner's timely objection to its admission, the evidence clearly would have been insufficient to sustain his

conviction. This evidence was critical in establishing the nexus between appellant and the vehicle in which the 28 illegal entrant aliens were found. If this nexus had not been established, there would have been a complete failure of proof as to Petitioner's participation in the alien smuggling venture.

2. The decision of the panel upholding the finding of the District Court that Petitioner had abandoned his vehicle and therefore lacked standing to contest its search by border patrol agents was unsupported by precedent and clearly erroneous.

The Court of Appeals cited United States v. Jackson, 544 F.2d 407, 409 (9th Cir. 1976), in support of its holding that Petitioner's actions amounted to abandonment of the vehicle in question. Contrary to the Court's assertion, however, the Jackson case does not support this contention.

Initially, it must be noted that the Court of Appeals resorts to information learned after

the fact to justify the search. Specifically, the memorandum order recites at page 5 that "by leaving his truck on the side of the road, running off into the night, door open, and keys in the ignition, Larke abandoned the truck." A reference to the statement of facts set forth above will clearly disclose, however, that prior to conducting the search, the agents did not know the identity of the driver. Petitioner did not claim standing in the Court below by virtue of his having driven the vehicle, and this fact alone would clearly have been insufficient to confer standing upon him under Rakas v. Illinois, _____ U.S.____ 58 L. Ed 2d 387 (1978). Rather, Petitioner asserted standing by virtue of his ownership of the vehicle which was searched under United States v. Mulligan, 488 F.2d 732, 736-737 (9th Cir. 1973).

At the time the search was conducted,

the officers had absolutely no reason for believing that Petitioner was the driver of the vehicle who left it at the side of the road as Petitoner was not apprehended in the area until after the search was effected. Thus, there was absolutely no support in the record for the Panel's determination that as of the time of the search the officers had reason to believe that Petitioner was the driver and that Petitioner abandoned his expectation of privacy in the locked rear compartment of the vehicle in which the aliens were located. Given this state of affairs, the activities of the unknown driver in leaving the vehicle at the side of the road certainly cannot be held to establish the the abandonment of the privacy interest of the owner of the vehicle in the locked rear compartment of the vehicle in which the aliens were discovered.

Apart from this deficiency in reasoning, however, and the Court's assuming facts not in the record, the principal case relied upon by the Court in upholding the District Court's finding of abandonment is inapposite. United States v. Jackson, 544 F.2d 407-409 (9th Cir. 1976), was a case in which an individual was approached at an airport by agents of the Drug Enforcement Administration and engaged in conversation. This individual looked back at the officers, immediately dropped the suitcase he was carrying and continued walking away in a hurried manner. He was thereafter arrested. After being warned of his rights, the individual denied dropping the suitcase, saying that it was not his and that he had never seen it before. A search of the suitcase revealed contraband.

The Court of Appeals in dealing with this factual situation properly held that the Defendant in that case had clearly abandoned

any privacy expectation he might have had in the briefcase by not only leaving it in the public thoroughfare but denying his possession of it when questioned concerning it by the officers. By contrast, the vehicle in the instant case was left at the side of a public thoroughfare and its rear compartment was secured with a padlock. Although Petitioner recognizes that the concept of legal abandonment is not dependent upon property right concepts, it is nevertheless apparent from the circumstances that the owner of an apparent commercial vehicle, as distinguished from its driver, does not relinquish his privacy interest in the contents of the locked cargo compartment of the vehicle when the driver pulls the vehicle to the side of the road and runs away from it. Here, as in Michigan v. Tyler, 436 U.S. 499, 505 (1978), the facts known to the officers did not support an

objective determination that the owner of the vehicle had abandoned his expectation of privacy in the contents of his property.

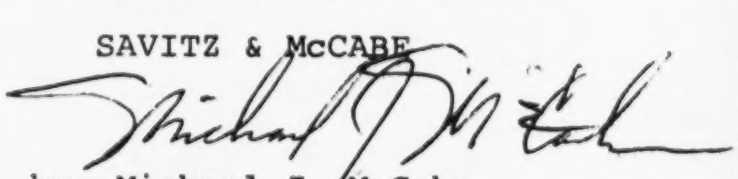
CONCLUSION

For the foregoing reasons, Petitioner, THOMAS WLATER LARKE, respectfully requests that a Writ of Certiorari issue to review the opinion of the Ninth Circuit Court of Appeals entered on August 30, 1979.

Dated: November 19, 1979

Respectfully submitted,

SAVITZ & McCABE



by: Michael J. McCabe
Attorneys for Petitioner,
THOMAS WALTER LARKE

PROOF OF SERVICE

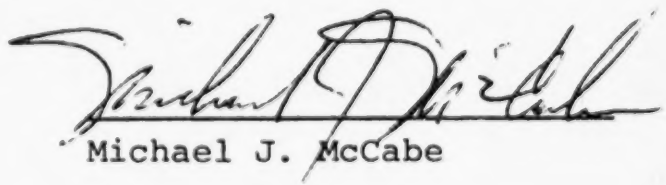
I, the undersigned say: I am over 18 years of age, employed in the County of San Diego, California, in which County the within-mentioned mailing occurred, and not a party to the action. My business address is 108 Ivy Street, San Diego, California.

On November 20, 1979, I deposited in the U.S. mail, at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of PETITION FOR WRIT OF CERTIORARI FOR THOMAS WALTER LARKE, Petitioner, to the following:

Solicitor General of the United States
Honorable Wade McCree
Department of Justice
Washinton, D.C. 20430

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 20th day of November, 1979, at San Diego, California.



Michael J. McCabe

retyped

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 79-1342
	)	
vs.	)	MEMORANDUM
	)	
THOMAS WALTER LARKE,	)	
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court for the Southern District of California

Before: WRIGHT and ANDERSON, Circuit Judges, and WHELAN,* District Judge

Larke was charged with illegal transportation of aliens, in violation of 8 U.S.C. Section 1324. A jury returned a verdict of guilty and Larke appeals to this court. This court has jurisdiction under 28 U.S.C. Section 1291.

On appeal Larke raises four issues:

*The Honorable Francis C. Whelan, Senior United States District Judge for the central District of California, sitting by designation

Appendix "A"

(1) whether the district court erred in denying his motion to suppress evidence relating to the discovery of 28 illegal aliens found in the search of his vehicle;

(2) whether the district court erred in refusing to permit the appellant to augment the testimony introduced at the hearings on his motions to include the testimony of Chula Vista Police Officer Ken Dyke;

(3) whether the district court erred in admitting into evidence an alleged copy of the vehicle registration where no chain of custody for that document was established by testimony and where its authenticty was never demonstrated; and

(4) whether the district court erred in failing to grant the appellant's motion for judgment of acquittal on the ground that there was insufficient evidence to establish that the appellant was the perpetrator of the crime charged.

After careful consideration of the appellant's arguments, we find them without

merit. We affirm.

FACTS

On the early morning of February 14, 1979, Border Patrol Agent Skinner was eastbound on Otay Lakes Road when he encountered a white one-ton Ford truck traveling at a high rate of speed. Agent Skinner followed the truck for approximately three miles, during which time he reached speeds in excess of 100 miles per hour. Skinner observed the truck extinguish its lights and turn north on a section of Otay Lakes Road known as the "Bonita cutoff". Approximately 100 yards after making this turn, the driver stopped the truck on the right-hand side of the road and leaped out of the door and ran up a steep embankment towards a housing project. The truck was left with the door open and the keys in the ignition.

After determining that he could not

overtake the driver, Agent Skinner attempted to determine whether there were any people concealed within the cargo compartment of the truck by pounding on the side of the vehicle. Hearing no sound inside the cargo compartment, Skinner ran a vehicle check on the truck. He was informed that the truck was registered to Thomas Walter Larke, the appellant. Following receipt of this information, he requested a back-up unit from the Chula Vista Police Department. When Police Officer Dyke arrived, the padlocked rear door of the truck was forced open and 28 illegal aliens were discovered inside.

During the time that Agent Skinner was conducting his search of the truck, Agent Lamp overheard on his radio Skinner running the registration check on the truck and the dispatcher's report that it was registered to the appellant. Approximately five minutes after hearing this communication, while

walking in a housing project near Otay Lakes Road, Lamp noticed a man walking ahead of him. The man in front of him was wearing pants which were wet from the knees down, as were his shoes. Lamp approached the man and asked for some identification. The individual identified himself through a display of his driver's license which showed him to be Thomas Walter Larke. Larke was then taken into custody by Agent Lamp. He was subsequently indicted and convicted.

ANALYSIS

1. Search

In United States v. Jackson, 544 F.2d 407, 409 (9th Cir. 1976), this court stated:

> "Abandonment .... is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search."

It is clear that Larke meets this test. By leaving his truck on the side of the road,

running off into the night, door open, and keys in the ignition, Larke abandoned the truck. As a consequence, he now has no standing to complain of the search.

2. Officer Dyke's Testimony

Officer Dyke was prepared to testify concerning the parked position of the abandoned truck. This evidence was properly excluded by the trial judge as cumulative evidence under Rule 403, Fed. R. Evid. Moreover, our decision that the truck was abandoned does not rest solely on its parked position. If there was error, it was harmless error.

3. Chain of Custody and Authenticity

There was sufficient evidence for the jury to infer that the registration certificate had been in the truck, was removed by one of the police personnel, and handed to the Border Patrol Agent. The authenticity

of the registration certificate could also be inferred by the jury. The indicia of reliability and trustworthiness of chain of custody and authenticity are sufficiently strong as to preclude any miscarriage of justice in this case.

4. Sufficiency of Evidence

The test for determining whether to grant a motion for judgment of acquittal under Rule 29(c) "is whether at the time of the motion there was relevant evidence from which the jury could reasonably find (the Defendant) guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the Government." United States v. Figueroa-Paz, 468 F.2d 1055, 1058 (9th Cir. 1972); United States v. Rojas, 554 F.2d 938, 943 (9th Cir.1977).

In light of this standard, we cannot disagree with the district court's disposition of the appellant's motion.

CONCLUSION

None of the issues raised are meritorious.

Accordingly, the conviction is AFFIRMED.